CR 151

(3)

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

CIVIL REVISION NO. 141 /2005

SINGLE BENCH

PETITIONER : **BHAIYYALAL RANDIVE**
(DEFENDANT)
Aged about 70 years
S/o. Late Marotirao Randive
Shop Address : Randive Mechanical Shop, Near Farishta Complex and Chhattisgarh Khandelwal, Dharmshala Station Road, Durg (C.G.)

P.R. No. 30/28/05
Presented by Shri M.G. Tamaskar
dated 28/11/05

VERSUS

RESPONDENTS : **SHYAM SUNDAR KHANDELWAL**
(PLAINTIFF)
Aged about 56 years
S/o. Late Shri Prabhu Dayal Khandelwal
R/o. Gandhi Chowk Durg, Tahsil & District Durg (C.G.)

17 NOV 2005

CIVIL REVISION U/S. 115 OF THE CODE OF CIVIL PROCEDURE

HIGH COURT OF CHHATTISGARH : BILASPUR

Civil Revision No. 141 of 2005

Applicant/ Defendant : **Bhaiyyalal Randive**

Vs.

Respondent/ Plaintiff : **Shyam Sundar Khandelwal**

Applicant by Shri V.G.Tamaskar, Advocate.

ORDER
(Passed on 02/12/2005)

The applicant by the instant revision under Section 115 of the Code of Civil Procedure (for brevity 'the Code') has challenged the illegality and validity of the order dated 06.10.2005 passed in Civil Suit No. 09-A/2005 by the IIIrd Civil Judge, Class-II, Durg (C.G.) and by which the application of the applicant under Order 7 Rule 11 of the Code for rejecting the plaint, has been dismissed. (Parties hereinafter shall be referred to as per their description before the trial Court.)

2. The grievance of the defendant is that the plaintiff filed a suit for eviction under Accommodation Control Act claiming himself to be the owner of the suit accommodation on the basis of Will dated 16.03.2001 executed by the original owner. The defendant moved an application under Order 7 Rule 11 of the Code and submitted that the plaintiff is claiming himself to be owner of the suit accommodation on the strength Will executed by the owner Radheshyam Khandelwal who is resident of Jaipur, Rajasthan. The defendant has denied the execution of the Will and submitted that the plaintiff cannot be considered owner of the suit accommodation unless the Will is probated by the competent Court as per provisions of Sections 217 and 218 of the Indian Succession Act, 1925 and in the absence of probate, the instant suit filed by the plaintiff is premature and therefore, it is not maintainable and accordingly, it should be dismissed as no cause of action has accrued to the plaintiff against the defendant.

3. This application has been rejected by the learned trial court by recording a finding that the defendant has acknowledged himself to be tenant of the plaintiff and therefore, the instant application which has been filed at the stage of evidence is not maintainable. The learned trial Court has also held that name of the plaintiff has been validly mutated in the Nuzul records by the concerned officer and in view of this, the suit cannot be dismissed.

4. Learned counsel for the appellant/defendant reiterating the above arguments submits that the order impugned is contrary to law and the same deserves to be set aside and the suit being premature deserves to be dismissed as the plaintiff did not obtain probate from the competent Court.

5. In support of his contention learned counsel for the appellant/defendant places his reliance on the judgment delivered in the matter of **Commissioner, Jalandhar Division and others Vs. Mohan Krishan Abrol and another** reported in **(2004) 7 SCC 505.**

6. I have heard learned counsel for the applicant.

7. The impugned order has been passed by the learned trial Court with a finding that the appellant/defendant has acknowledged the respondent/plaintiff as a landlord of the suit premises, even otherwise Nuzul lease with respect to the disputed shop has been renewed vide order dated 16.05.2002 after mutation and further that the suit is only for eviction under Accommodation Control Act and is not title suit and the same can be filed without obtaining probate.

8. In the matter of Commissioner, Jalandhar Division (supra) it has been held by the Apex Court that bar contained under Section 217 of Indian Succession Act, 1925 comes into play only when the right as an executor or a legatee under Will is sought to be established. However, an unprobated Will can be admitted in evidence for collateral purposes in any other proceedings apart from probate proceedings.

9. Thus in the light of the aforesaid discussions and the law laid down by the Apex Court in the above cited judgment, I am of the opinion that there is no illegality in the impugned order which warrants interference while exercising revisional jurisdiction under Section 115 of the Code. Accordingly, the revision is dismissed.

Sd/-
Dhirendra Mishra
Judge